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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 4941

BURNHAM VAN SERVICE, et al.,
Appellants,

vs.

CAYCE R. PENTECOST, et al.,
Appellees.

On Appeal from the Supreme Court of Tennessee.

JURISDICTIONAL STATEMENT.

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On Appeal from the Supreme Court of Tennessee.

JURISDICTIONAL STATEMENT.

MAY IT PLEASE THE COURT:

PARTIES TO APPEAL.

The Appellants are 27 in number.[1] The case below bore the style of Aero Mayflower Transit Company et al. v. Cayce R. Pentecost et al. Aero Mayflower Transit Com-

[1] Paul Arpin and Sons, Atlas Van Lines, Inc., Delcher Moving and Storage Company, Inc., The Ferguson Moving and Storage Company, John F. Ivory Storage Company, Inc., Neptune World

pany was allowed to withdraw as a party complainant in the trial court, but the case continued to bear the same style through the Supreme Court of Tennessee, and the record from such Court, which is filed here, bears such style.

REPORT OF OPINIONS.

There was no opinion rendered by the Supreme Court of Tennessee in this case, and the Opinion of the Court of Appeals of Tennessee, Middle Section, is unreported. The Opinions of the Chancellor and the Court of Appeals are attached as Appendices I and II.

GROUNDS ON WHICH JURISDICTION IS INVOKED.

I.

This proceeding is an appeal wherein is drawn the question of the validity of statutes of the State of Tennessee on the grounds that they are repugnant to the Constitution of the United States, and the final decision of the Supreme Court of Tennessee, was in favor of the validity of such statutes.

II.

The judgment of the Supreme Court of Tennessee sought to be reviewed was made and entered on April 7, 1965, and a copy of same is attached as Appendix III. By such

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Wide Moving Company, North American Van Lines, Republic Van and Storage Company, Inc., United States Van Lines, Inc., United Van Lines, Inc., Wheaton Van Lines, National Van Lines, Washburn Storage Company, Baggett Transportation Company, American Red Ball Transit Company, Suddath Moving and Storage Company, Inc., Burnham Van Service, Youngblood Van and Storage Company, Santini Brothers, Inc., Dooley Transfer and Storage, Bekins Van Lines Company, Hood-Garrison Van and Storage Company, Jackson Van and Storage Company, Inc., Withers Van Lines of Miami, Inc., Consolidated Van and Storage Company, Global Van Lines, Inc., Lakewood Storage, Inc.

judgment the Supreme Court of Tennessee denied the Appellants' Petition for a Writ of Certiorari to review the judgment of the Court of Appeals of Tennessee, Middle Section, which affirmed the action of the Chancery Court in dismissing Appellants' Original Petition. Notice of Appeal was filed in the Supreme Court of Tennessee on July 1, 1965.

III.

Jurisdiction of this Court is conferred by **28 U. S. C., Sec. 1257 (2)** which permits appeals from the highest court of a state where is drawn in question the validity of a statute of a state on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

IV.

The following cases sustain the jurisdiction of this appeal: American Refrigerator Transit Company v. Hall, **43 L. Ed. 899, 174 U. S. 70**; Union Refrigerator Transit Company v. Lynch, **44 L. Ed. 708, 177 U. S. 149**; Johnson Oil Refining Company v. Oklahoma, **54 S. Ct. 152, 290 U. S. 158**; Northwest Airlines v. State of Minnesota, **64 S. Ct. 950, 322 U. S. 292**; Ott v. Miss. Valley Barge Line Company, **69 S. Ct. 432, 336 U. S. 169**; Braniff Airways v. Nebraska State Board, etc., **74 S. Ct. 757, 347 U. S. 590**; Central Railroad Company v. Pennsylvania, **82 S. Ct. 1297, 370 U. S. 725**; Bibb v. Navajo Freight Lines Company, **79 S. Ct. 962, 359 U. S. 520**; Shafer v. Farmers' Grain Company of Embden, **45 S. Ct. 481, 268 U. S. 189**; Caldwell v. North Carolina, **47 L. Ed. 336, 187 U. S. 622**; Robbins v. Shelby County Taxing District, **30 L. Ed. 694, 120 U. S. 489.**

V.

The validity of certain sections of **Chapter 9 of Title 67, Tennessee Code Annotated** is involved, these sections

particularly being 67-901, 67-906B (2), 67-913, 67-920 (2), 67-931. Copies of these and other related sections of such Chapter are attached as Appendix IV.

QUESTIONS PRESENTED.

1. Whether or not **Chapter 9 of Title 67, Tennessee Code Annotated** (and particularly Sections 67-901, 67-906B (2), 67-913, 67-920B (2), 67-931) is in violation of the "Due Process Clause" of Section 1 of the Fourteenth Amendment to the United States Constitution by reason of the fact that it permits a county (95 in Tennessee), municipality (several hundred), or taxing district (innumerable) to levy and collect an ad valorem tax upon personal property of a non-resident of Tennessee although the personal property of the non-resident has acquired no actual tax situs therein by being regularly and habitually within said county, municipality, or taxing district, or even regularly and habitually in the State of Tennessee; and consequently whether or not the tax assessment against Appellants and proposed distribution of same by the Public Service Commission to the various counties, municipalities, and taxing districts are illegal and void.

2. Whether or not the requirement contained in **T. C. A. 67-906B (2)** that irregular route carriers shall report the number of vehicle miles operated in each county, municipality, or taxing district in the state imposes upon the Appellants such an impossible task, and one where even attempted compliance is so expensive, causes such great delays, and creates such dangerous highway hazards, as to render said provision void under Article 1, Section 8, of the Constitution of the United States because it creates an undue burden upon interstate commerce; and if same is void, then whether or not **T. C. A. 67-913** is not likewise void by reason of the fact that the Appellants cannot be deemed to have waived the method of assess-

ment and distribution by failing to comply with a void requirement.

3. Whether or not the failure of the Public Service Commission to strictly enforce the requirements of **T. C. A. 67-906B (2)** can preclude the right of the Appellants to attack the validity of same, the validity of the remainder of **Chapter 9 of Title 67, T. C. A.**, or of the assessments against Appellants and the distribution thereof.

STATEMENT OF THE CASE.

Tennessee has no State ad valorem tax on any type of property, a statute formerly providing for such having been repealed in 1949; but counties and municipalities are authorized to, and do, levy ad valorem taxes on all types of property. **Chapter 9 of Title 67, of T. C. A.** provides for the assessment of utilities and carriers by the Tennessee Public Service Commission, and the distribution of such assessments to various counties, municipalities, and taxing districts for local taxation. It provides that irregular route motor carriers, by virtue of their operations into Tennessee, shall have a situs in Tennessee, the same to be determined by the Commission. Such chapter also provides that the Commission shall compute the value of each vehicle mile by a formula, which value shall be multiplied by the number of miles traveled in each county, municipality, or taxing district, and thus compute the assessments for such counties, municipalities, or taxing districts. It will be noted from Appendix IV that under **T. C. A. 67-906B (2)** all irregular route motor carriers are required to report bi-annually the number of miles operated in or through Tennessee, and also ". . . the number of vehicle miles operated during the prior calendar year within, into and/or through each county, incorporated municipality and/or taxing district . . ."; and that **T. C. A. 67-913** provides that any carrier who fails to make the required report shall be deemed to have

waived the mode and manner of the assessment and the distribution thereof, and further shall be subjected to a penalty of $100.00 per day for its delinquency. Under this Section, when the Commission is not furnished the mileage in the various counties, municipalities and taxing districts, it may arbitrarily distribute the total assessment to any of the counties, municipalities, or taxing districts of the State.

The Appellants are 27 non-resident irregular route motor carriers engaged exclusively in interstate commerce, and all but one of the Appellants, which is engaged in a similar business, are engaged exclusively in the moving of household goods. As the Public Service Commission was about to distribute the ad valorem assessments of the Appellants to various counties and municipalities of the State in 1959, the Appellants instituted this proceeding by filing a Petition in the Chancery Court for Davidson County, Tennessee, against the Tennessee Public Service Commission, the State Board of Equalization, and the State Attorney General and Reporter for a certiorari and supersedeas to review the action of the Public Service Commission and the Board of Equalization in making ad valorem tax assessments against the several Appellants, and obtained a temporary injunction, which is still in force, restraining the Public Service Commission from distributing the assessments. The Petition, and an amendment thereto, attacked the validity of the hereinbefore mentioned statutes on the ground that they were in violation of the "Due Process Clause" of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and upon the ground that they violated Article 1, Section 8 of the Constitution of the United States. It was charged that the Statutes were in violation of the "Due Process Clause" because they permitted assessments for county and municipal ad valorem taxation of the Appellants, non-residents of the State of Ten-

nessee who have no property regularly or habitually within any county or municipality of the State of Tennessee, or even regularly and habitually in the State of Tennessee. It was charged that the Statutes violated the "Commerce Clause" because it was impossible for the Appellants to comply with the provisions of the **T. C. A. 67-906B (2)** requiring them to report the number of miles traveled in each county, municipality, and taxing district. For these reasons, the Petition sought to have the assessments declared null and void, and their distribution permanently enjoined.

Of the twenty-seven Appellants, nine did not file any of the form reports as to their operation with the Public Service Commission. The remaining eighteen filed the report on the form furnished by the Commission, but none of them attempted to give a break-down of the number of vehicular miles traveled in the various municipalities, counties, or taxing districts in Tennessee, as is called for on page 10 of the form reports. Because of this, the Public Service Commission was about to arbitrarily distribute the assessments against the Appellants to various counties, municipalities, and taxing districts of the State, under the waiver provisions of **T. C. A. 67-913.**

With the exception of one Appellant which has a small amount of fixed property in Chattanooga, none of the Appellants have any property in the State of Tennessee, except their moving trucks and vans. The appellants, in their strictly interstate long-distance household moving business very seldom operate over the same routes. They operate over the county highways and back roads as well as over the main state and federal highways in a haphazard method to wherever a new customer might desire to move his household belongings, seldom knowing in advance the next destination. While two or three of the Appellants which do the largest volume of business in Tennessee might have some vehicle regularly and habit-

ually in the State of Tennessee, the remaining Appellants do not. None of the Appellants have vehicles regularly and habitually in any particular county, municipality, or taxing district of the State.

For example, among the Appellants doing the largest volume of business in Tennessee is National Van Lines. It does its largest volume of business in Shelby County where it had a vehicle 260 days in the calendar year 1958, the year covered by the report. This does not mean that the same vehicle was in Shelby County on 260 different days, but it means that different vehicles out of the National fleet were in Shelby County to load or unload a shipment on a particular day. The time actually in Shelby County may have been only a matter of a few hours. It received an assessment of $14,000.00. Another of the larger users of Tennessee highways was Wheaton Van Lines. Its largest volume was also Shelby County where it had a vehicle 137 days out of the year, and its second greatest volume was in Knox County where it had a vehicle 29 days out of the year. Its assessment was $10,000.00.

Among the Appellants in the middle bracket is Paul Arpin and Sons. Its vehicles traveled 14,245 miles in Tennessee in 1958. It operated in 64 counties, it had a vehicle in Tennessee 91 days out of the year, and its largest operation was in Shelby County where it had a vehicle for some period of time on 40 days out of the year. It received an assessment of $3,000.00. Bagby Transfer Company had ten trucks in Hamilton County a total of 20 days and in other counties a lesser number. Its assessment was $5,000.00. Burnham Van Service, Inc. operated thirty-three trucks through Tennessee in 1958, had its largest volume of business in Montgomery County where it had vehicles a portion of 40 days out of the year, and it received a $5,500.00 assessment.

Among the smaller operators, Dooley Transfer Company, Inc., traveled only 2,223 miles in Tennessee, and received a $2,000.00 assessment. Its trucks passed somewhere through the State of Tennessee three or four times per month. Its largest volume of business was in Davidson County where it had a vehicle 3 days. Hood-Garrison Van & Storage Company made about thirty trips across Tennessee in the year, had its largest volume of business in Davidson County, where it had a truck six days, and its next largest in Hamilton County where it had a truck 3 days. It was assessed at $10,000.00 Jackson Transfer & Storage Company operated three trucks into Tennessee, did its largest volume of business in Shelby County where it had a truck 3 days, and had vehicles only 7 days in other counties of the State. Its assessment was $10,000.00.

Shawmut Van Lines, Inc., with an assessment of $3,500.00, had absolutely no trucks in the State of Tennessee during the year 1958; and this was properly reported to the Public Service Commission by Shawmut Van Lines, Inc. on the forms provided by the Commission.

All of these assessments were over and above a $1,000.00 statutory exemption.

The undisputed proof showed that it was impossible for the Appellants to record and report the mileage traveled in the various counties, municipalities, and taxing districts of the State for the reason that there were inadequate highway markings indicating the boundary lines of the counties and municipalities, particularly on secondary roads over which the Appellants frequently traveled; and there were usually no markings at all indicating the various taxing districts, such as levy districts, drainage districts, school districts, and the like. Furthermore, there are no maps available from which mileage in the various counties, municipalities or taxing districts can be determined. It also showed that even attempted compliance

was very time consuming and hazardous, would require violation of the Interstate Commerce Commission regulations, and would be very expensive, actually more than the tax involved. Representatives of Neptune Storage Company, Inc., and United States Van Lines, Inc., estimated that attempted compliance would cost them an additional ten thousand dollars per year, and a representative from smaller Delcher Brothers, Inc., estimated that attempted compliance would cost it three thousand dollars per year. A representative of Jackson Transfer and Storage Company, Inc., stated that it would cost an additional $100.00 per trip through Tennessee.

The Chancellor dismissed the suit on behalf of the nine Appellants who failed to file the reports on the ground of the waiver provision in **T. C. A. 67-913.** He held that the tax involved was a State tax and not a local tax. He found as a fact that compliance with the provisions of **T. C. A. 67-906B (2)** was an impossibility, stating:

> "I do think that a literal compliance as to the mileage as required by the Act is an impossibility. No driver could ever know when he entered and left taxing districts."

The Chancellor held, however, that the Appellants could not complain about such impossibility because the Public Service Commission was not requiring full compliance with the Statute, stating:

> "So in this situation how can the carriers complain about a statute which is not being enforced against them?"

The Chancellor then held the Statutes complained of to be constitutional, the assessments and proposed distributions valid, and dismissed the suit on behalf of the remaining Appellants (Appendix I).

The validity of these statutes was again challenged in the Court of Appeals of Tennessee, Middle Section, by as-

signments of error. The Court of Appeals affirmed the Chancery Court in a two to one Opinion which is attached hereto as Appendix II. The Court of Appeals conceded that the tax involved was a local one and not a State tax, but it did not then proceed to discuss the next question—whether or not personal property of a non-resident must be habitually and regularly in a particular county or municipality in order to have a tax situs there, and be subject to county or municipal taxation. Instead, it merely decided the question adversely to Appellants by referring to three previous decisions of Tennessee Appellate Courts which held **Chapter 9 of Title 67, T. C. A.** constitutional and not a violation of "Due Process," but which in turn did not discuss such question, and in which cases the contention that the requirement of filing of reports of mileage in municipalities, counties and taxing districts was a burden on interstate commerce was not even made.

Although recognizing that compliance with the statute by reporting all mileage in cities, counties, and taxing districts was impossible, the Court of Appeals adopted the view of the Chancellor, that, since strict compliance was not being required by the Commission, interstate commerce was not burdened, and the Appellants could, therefore, not complain that the requirement of the statute imposed an undue burden on interstate commerce.

The Supreme Court of Tennessee denied the Petition of the Appellants for a Writ of Certiorari to review the decision of the Court of Appeals without a hearing, and without any opinion.

The importance of this case must be realized. It affects not just the liability of 27 interstate household movers to pay taxes for the year 1959 to various counties, municipalities and taxing districts of Tennessee. It affects the entire industry. Involved in this case is the arbitrary exercise of power by the State in authorizing the multitude of counties, municipalities, and overlapping taxing

districts of Tennessee to tax the property of all of the household goods movers of the nation although they have no property with a situs there, and this for all the years to come. Likewise involved is the fact that if Tennesssee can so treat non-resident interstate movers, so can every other state of the Union. Of equal importance is the attempt by one state (with others undoubtedly to follow) to use a failure by non-resident movers to comply with an impossible burden upon interstate commerce as a basis for implying a fictitious consent to local taxation. We respectfully submit that this case therefore presents very substantial Federal questions as will hereinafter be further shown.

FEDERAL QUESTIONS ARE SUBSTANTIAL.

1. The Challenged Sections of Chapter 9, Title 67, T. C. A., Are in Violation of the "Due Process Clause."

Starting with Pullman's Palace Car Company v. Pennsylvania, **35 L. Ed. 613, 141 U. S. 18**, down through several cases, including Union Refrigerator Transit Company v. Lynch, *supra*, Johnson Oil Refining Company v. Oklahoma, *supra*, Braniff Airways v. Nebraska State Board, etc., *supra*, this Court has laid down the rule that the "Due Process Clause" permits a State to levy ad valorem taxes upon the movable vehicles of a non-resident carrier passing through the State in interstate commerce where the carrier has vehicles regularly and habitually in the State, although the specific vehicles in the State are constantly changing. This Court, however, has clung to the principle that the non-resident must have property habitually within the State. Mr. Justice Reed, as recently as 1954, in the Braniff Airways case, quoting from the older Johnson Oil Refining Company case stated: "The basis of the jurisdiction is the habitual employment of the property within the state." The case of Ott v.

Mississippi Valley Barge Line Company, *supra*, has sometimes been cited improperly as authority for the proposition that a state can levy a tax upon an interstate carrier although it does not have property habitually in the state. Actually, however, this Court did not so hold, but refused to consider the question of whether or not the Barge Line had property regularly and habitually within the state because the Barge Line had not exhausted its state remedy for contesting assessments. In so holding, Mr. Justice Douglas stated:

> "We do not stop to resolve the question. Louisiana's Attorney General states in his brief that the statute 'was intended to cover and actually covers here an average portion of property permanently within the State—and by permanently is meant throughout the taxing year.' Appellees do not suggest an absence of any administrative or judicial remedy in Louisiana to correct errors in the assessment."

Unlike the Appellants in the Barge Line case, the Appellants here have exhausted their state remedy.

That extensive, if not constant, use in a state is required for property of a non-resident to acquire a tax situs there is shown by the statement of Mr. Justice Frankfurter in the case of Northwest Airlines v. State of Minnesota, *supra*:

> ". . . But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. (Thus, for instance, 'The coaches of the company * * * are daily passing from one end of the state to the other,' in Pullman's Palace-Car Co. v. Pennsylvania, supra, 141 U. S. at page 30, 11 S. Ct. at page 877, 35 L. Ed. 613, citing the opinion of the court below in 107 Pa. 156, 160.) The continuous protection by a State other than the domiciliary

> State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered."

Also see recent case of Central Railroad Co. v. Pennsylvania, *supra.*

We are dealing here, however, not with state taxes, but with local ad valorem taxes of counties, municipalities, and taxing districts. It is our firm insistence that the same rule must be applied in determining situs for taxation in any county or municipality as is used to determine situs within a state for state taxation. So far as we can determine, this contention presents a case of first impressions for this Court. Our insistence is certainly not inconsistent with any decisions of this Court, and we believe the principle has been tacitly recognized by several prior decisions.

The case of Union Refrigerator Transit Company v. Lynch, *supra,* involved both state and county taxes, and the opinion shows that the county wherein the suit was brought was one of the counties through which the cars of Union Refrigerator Transit Company passed. The Johnson Oil Refining Company case involved a county tax of Pawnee County, and the Court found that Johnson Oil Refining Company had a daily average of 64 cars in Pawnee County. The case of Ott v. Mississippi Valley Barge Line Company involved both state taxes and a tax of the City of New Orleans, but footnote on page 433 of **69 S. Ct.** indicates that the entire time the vessels spent in Louisiana was in the City of New Orleans.

There are numerous state cases, including Tennessee, uniformly holding that a county or municipality cannot levy an ad valorem tax upon the personal property of a

non-resident unless such personal property has acquired a tax situs within the county by being physically present therein. The most aptly worded state court opinion endorsing our insistence is one by the Supreme Court of California in the case of Sayles v. Los Angeles County, 138 P. 2d 768, which stated:

> "The question before us covers not only the possible tax situs of the tug in California, but also the identity of the particular county where such situs would be; for substantially the same rule that governs the taxation of tangible personal property as between different states or countries, also prevails as between different counties in this state."

All of the cases of this Court, except the Braniff Airways case, that we have been able to find which passed upon the question of tax situs for movable property, involved situations where some property was constantly within the taxing jurisdiction. In the Braniff Airways case, which involved only state taxation, its airplanes made 18 regularly scheduled trips into the state per day for a total of 6,570 trips per year. This is a great deal more regular and habitual use of movable property within the taxing jurisdiction than the occasional and sporadic visits of the Appellants to the various counties, municipalities, or taxing districts in Tennessee as heretofore shown.

The persuasive argument of counsel for the Appellees in the Courts below has been to the effect that if the Appellants are not subject to the local taxes in the counties, municipalities, and taxing districts of Tennessee, then they will pay no ad valorem property taxes in Tennessee, and such pro rata portion of their total rolling property will remain untaxed by any jurisdiction. No authority need be cited for answer to this—simply that if the movable personal property of the owner acquires

no situs elsewhere, then its situs remains at the domicile of the owner and it is taxable there. See Central Railroad Co. v. Pennsylvania, *supra*, and Northwest Airlines v. State of Minnesota, *supra*. It is submitted that if a motor carrier had a truck in 91 different counties of Tennessee for 4 different days out of the calendar year, then such carrier, operating in Tennessee 364 days of the year, would probably have property habitually in Tennessee subject to State taxation, but that there would be no habitual use in any county so as to subject the property to county taxation; and most of the Appellants have a lesser operation in Tennessee than such illustration.

We lastly call the Court's attention to the fact that most of the Appellants did not even have property habitually in the State of Tennessee so as to acquire a situs for any type of ad valorem property taxation, and certainly not the smaller ones with only a few trips per year into the State, or Shawmut Van Lines, Inc., which had no trucks at all in the State of Tennessee.

It is respectfully submitted that it is a violation of the "Due Process Clause" for any jurisdiction, however large or small, whether state, county or municipal, to attempt to levy an ad valorem tax on property of a non-resident unless same has acquired a tax situs therein by being habitually physically present in such jurisdiction; and that **T. C. A. 67-901** legislating a tax situs cannot stand.

2. and 3. **T. C. A. Section 67-906B (2) and T. C. A. 67-913 Create an Undue Burden on Interstate Commerce, and Appellants Are Not Precluded From This Attack by Any Failure of the Public Service Commission to Strictly Enforce Same.**

The language of **T. C. A. 67-906B (2)** is clear in requiring the Appellants to report to the Public Service Commission "the number of vehicle miles operated during the

prior calendar year within, into and/or through each county, incorporated municipality and/or taxing district authorized by law to collect ad valorem taxes within the State of Tennessee." Not only did the Chancellor find that compliance with such was impossible, same being concurred in by the Court of Appeals of Tennessee, but all of the proof showed that even attempted compliance would be extremely expensive, hazardous, and cause violations of Regulations of the Interstate Commerce Commission.

There have been thousands of cases decided under the Commerce Clause of the United States Constitution. We feel that we need cite only a few in support of our contention that the above quoted requirement creates an undue burden upon interstate commerce. Our contention has as its basis three well-recognized principles. No state law, tax, or regulation may regulate, or impose a direct burden upon, interstate commerce; with the exception that a non-discriminatory statute enacted under the police power of a state may impose a reasonable burden upon interstate commerce. Caldwell v. North Carolina, *supra*, Robbins v. Shelby County Taxing District, *supra*. Even a state law enacted under the police power which substantially burdens interstate commerce is in violation of the "Commerce Clause". Bibb v. Navajo Freight Lines Co., *supra*, Shafer v. Farmers' Grain Company of Embden, *supra*. Thirdly, it matters not the purpose of the state law, nor whether or not there was an intention to burden interstate commerce. Regardless of the language of the statute, or the avowed purpose of the legislature, it can always be shown that the practical application of the Act is to create a burden upon interstate commerce. Foster-Fountain Packing Company, Inc. v. Haydel, *supra*.

Certainly, therefore, this impossible requirement, which is in a tax law and not a statute passed under the police power, creates an undue burden on interstate commerce.

As we understand the opinion, the Court of Appeals of Tennessee conceded that the enforcement of such provision would constitute an undue burden on interstate commerce, such Court stating:

> "We understand the complainants insist by their third assignment a strict compliance of T. C. A. 67-906 (2) on their part would result in an undue burden on interstate commerce. Conceding this to be true, yet it is obvious to us from this record that the Commission has not insisted upon a strict compliance with this section of the Act. But, to the contrary, has accepted and based its assessments upon the information furnished by those complainants reporting mileage in the State which are at best estimates of miles traveled in the State during the year 1958."

The Court of Appeals of Tennessee then concurred with the Chancellor's holding that the Appellants were in no position to contest the validity of such requirement because it was not being enforced against them.

We have two answers to such ruling. First, the failure of the authorities to strictly enforce a statute cannot preclude the right of affected parties to contest its validity, for the test of the validity of a statute is not what has been done under the statute, but what may be done. Montana Company v. St. Louis Mining and Milling Company, **38 L. Ed. 398, 152 U. S. 160**; Stuart v. Palmer, **74 N. Y. 183**; Hathorn v. National Carbonic Gas Company, **194 N. Y. 326, 87 N. E. 504**; Turner v. Eslick, **146 Tenn. 236, 240 S. W. 786.**

Second, the Public Service Commission has been enforcing said provision in a very detrimental and burdensome way. **T. C. A. 67-913** provides two methods of enforcement of the reporting of such "schedules and statements." It provides for a $100.00 per day penalty for

failure to furnish the information required, which penalty **T. C. A. 67-914** directs the Attorney General to enforce upon request of the Commission. It is true that this penalty has never yet been enforced. **T. C. A. 67-913** also provides that if the "schedules and statements" are not furnished, then the owner is deemed to have waived the manner of making the assessment and the manner of distributing same to the various counties and municipalities of the State. This latter method of enforcement is being carried out regularly by the Tennessee Public Service Commission, and such is the very subject of the Appellants' complaint.

Because of the impossibility of compliance, the Appellants leave blank that page of the form report furnished by the Commission calling for the mileage in the various counties, municipalities, or taxing districts. The Commission then applies the waiver provisions, and arbitrarily distributes the assessments to such of the various counties and municipalities of the State as the Commission may choose in its sole discretion. The counties, municipalities, and taxing districts to which the assessments are distributed may obviously be counties or municipalities in which the Appellants never had a vehicle at any time during the year, and where they are not subject to any tax.

We wish to clearly point out to the Court the trap in which the Appellants are caught. They are not subject to local ad valorem taxes because they do not have property habitually in any county or municipality. Nevertheless, the Legislature and the Commission have said to them that they must still report certain information—the mileage in the various counties, municipalities, and taxing districts. This information is impossible to obtain, and the Appellants have therefore not reported it. The Commission then applies the provision of **T. C. A. 67-913** and says that, by failing to do what is impossible, the

Appellants have waived all right to contest the validity and distribution of the assessments. If the requirement of reporting all such mileage and the waiver provisions are allowed to stand, then the Appellants are placed in the position of consenting to an illegal tax by failing to do the impossible. Certainly, these provisions create an unconstitutional burden upon interstate commerce.

Lastly, we call attention to the Court that the nine Appellants who failed to file any reports with the Public Service Commission are entitled to the full benefits of this appeal, just the same as the remaining Appellants. We have already demonstrated that such nine Appellants were not actually subject to a tax because they had no property regularly or habitually in any county, municipality, or taxing district of Tennessee. These nine were taxed under the waiver provisions of **T. C. A. 67-913.** When the waiver provisions are held void, then such nine Appellants may still properly show, as they have done, that they were not subject to taxation in any county, municipality, or taxing district of the State.

CONCLUSION.

It is therefore respectfully submitted that this Court has jurisdiction of this appeal, and should accept and hear same on its merits for the purpose of correcting the errors of the Supreme Court of Tennessee.

Respectfully submitted,

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APPENDIX I.

Aero Mayflower Transit Company, et al., vs. No. 81411 Cayce L. Pentecost, et al.	In the Chancery Court, Part One, at Nashville

Memorandum.

In this cause an order was entered on July 24, 1963 allowing Aero Mayflower Transit Company to withdraw as a party complainant and to pay the cost incident to it having been a party complainant.

The complainants listed below did not file the required reports with the Public Service Commission and this bill is dismissed as to them under T. C. A. 67-913.

1. Paul Arpin & Sons.
2. Consolidated Van and Storage Company.
3. Hood-Garrison Van & Storage Company.
4. Jackson Van and Storage Company, Inc.
5. Lakewood Storage, Inc.
6. National Van Lines.
7. Suddath Moving and Storage Company, Inc.
8. United States Van Lines, Inc.
9. Youngblood Van and Storage Company.

These nine complainants are taxed with the cost incident to their having been party complainants.

The constitutionality of the Act in question has certainly been put to rest by the decisions in the Howard

Sober, Inc., case, the Jack Cole case and finally by Justice White's opinion in the E. & L. Transport case.

I agree with the contention of the State that the tax involved is a State tax. The assessment is made by the Public Service Commission for the use and benefit of the counties, municipalities, etc. The apportionment of the tax is a burden for the Public Service Commission, not the irregular route carriers.

I see no merit in complainants' contention that they cannot comply with the provisions of the statute in reference to mileage traveled in the various counties, municipalities and taxing districts. My reasons for this are that there has been no compliance by complainants nor is there shown any attempt to do so. Further there has been no demand by the Public Service Commission for a literal compliance. So in this situation how can the carriers complain about a statute which is not being enforced against them? Practically every one of the reports filed give only an approximation of miles traveled in Tennessee and this was accepted by the Public Service Commission.

Another reason is that complainants want their bill to be treated as a declaratory judgment bill. As such there is no justiciable issue under the Act. As stated the State is not insisting on a literal compliance and it is a literal compliance that complainants are complaining about.

I do think that a literal compliance as to the mileage as required by the Act is an impossibility. No driver could ever know when he entered and left taxing districts. Even with this view I do not think the Court should disturb the Act until the carriers are called upon to fully comply with the Act. However, under the present situation the rights of the carriers are not hurt or impaired.

In this case I do not think the Court can be called upon to expressly find and declare what constitutes doing busi-

ness in the State of Tennessee and the frequency required for the properties of petitioners to be within the local jurisdiction to subject the same to assessment for taxation. To try to define "doing business" and "the frequency required" would be utter speculation on the part of the Court. Each case must stand on its own feet and the determination should be made on the administrative level.

As to these remaining complainants the bill is dismissed and each is taxed with its share of cost.

Decree accordingly.

/s/ Ned Lentz,
Ned Lentz, Chancellor.

This October 29, 1963.

APPENDIX II.

Aero Mayflower Transit Company et al.,
Complainants-Appellants,
vs.
Cayce R. Pentecost et al.,
Defendants-Appellees.
} Davidson Equity.

Court of Appeals of Tennessee,
Middle Section at Nashville.

Appeal From the Chancery Court of Davidson County.

Honorable Ned Lentz, Chancellor.

Stephenson, Lackey & Holman, of Nashville, Solicitors for Complainants-Appellants.

George F. McCanless, Attorney General, of Nashville, Milton P. Rice, Assistant Attorney General, of Nashville, Walker T. Tipton, Assistant Attorney General, of Nashville, Solicitor for Appellee—State Board of Equalization.

George Shuff, of Nashville, Solicitor for Appellee—Public Service Commission.

Affirmed. Filed Dec. 15, 1964.

Chester C. Chattin, Judge.

Aero Mayflower Transit Company et al.,
Complainants-Appellants,
vs.
Cayce R. Pentecost et al.,
Defendants-Appellees.
} Davidson Equity.

Opinion.

Complainants are foreign corporations engaged in the business of transporting freight by motor trucks in interstate commerce into and through Tennessee. They do no intrastate business in this state.

The Tennessee Public Service Commission, pursuant to T. C. A. 67-901, et seq., submitted forms to each of the complainants upon which complainants were requested to furnish to the Commission the total number of miles their respective motor vehicles traveled into, within and through each county and city of this state during the year 1958.

Complainants did not furnish the requested information. Nine of the complainants refused or failed to furnish the Commission with any information requested. However, twenty of the twenty-nine complainants did file schedules or statements of various amounts of mileage their trucks had operated into, within and through Tennessee during the year 1958.

The Commission made assessments for ad valorem taxes for the biennium 1959-60 against the complainants. The assessments were appealed to the State Board of Equalization which affirmed the assessments.

Thereupon, complainants filed a petition in the Chancery Court of Davidson County for the writs of certiorari and supersedeas. They also sought an injunction prohibiting the Commission from making distribution of the

assessments to the various counties and municipalities of the state for ad valorem tax purposes. The petition prayed for a declaratory judgment declaring the rights of complainants and the extent to which movable properties must be in the state and the local political subdivisions thereof to be subject to local ad valorem taxes.

The theory of the petition is that T. C. A. 67-906 (2) which requires foreign irregular route motor carriers, such as complainants, to report to the Commission the total mileage traveled into, within, and through the state as well as the total mileage into, within, and through the various cities and counties of the state during a calendar year is unreasonable and impossible of performance; and, therefore, unconstitutional and void in violation of the commerce clause of the Federal Constitution.

It is further insisted that complainants did not have property habitually, continuously or with such frequency during the year 1958 in this state as to cause their property to have a situs in the state and especially in any county or city of the state for the purpose of local taxation for the biennium of 1959-60.

The defendants answered the petition in which it was denied that T. C. A. 67-906 (2) cast an unreasonable or impossible burden upon interstate commerce; and that complainants did not have trucks or vans in the state with such frequency to have a tax situs in Tennessee and its political subdivisions.

Prior to the trial Aero Mayflower Transit Company was permitted to withdraw as a party complainant.

The proof shows and the Chancellor found as a fact that it would be impossible for complainants to accurately log each and every mile traveled in each and every city and county of the state during a calendar year. However, he further found the Commission had not demanded

a strict or literal compliance with this section of the Act. But had to the contrary accepted and based the assessments against those complainants which had furnished statements of mileage their trucks had traveled within, into and through Tennessee during the year 1958. Thus, he held they were not in a position to urge the unconstitutionality of the statute in this respect.

He dismissed the bill as to the nine complainants which had refused to furnish the Commission with any information as to the mileage their trucks had traveled in Tennessee during the year 1958 under authority of T. C. A. 67-913, which provides:

> "The owner of any such property refusing or failing to file such schedules and statements shall be deemed to have waived the mode and manner of ascertaining the value of such property, and of the distribution or allocation by the Tennessee Public Service Commission of such valuation or assessment to the various counties and municipalities of the State of Tennessee for the purposes of county and municipal taxation, and shall not be permitted to be heard in opposition to the valuation fixed upon said property by the Commission, nor in opposition to the distribution or allocation of same by the Commission to the various counties and municipalities for the purposes aforesaid."

He further held the tax was a state tax and not a local one.

He also declined to make a declaration of the rights and obligations of complainants under the Act.

Accordingly, he dismissed the petition.

Complainants have appealed to this Court and have in their very able and well prepared brief stated they rely upon the following three propositions:

"1. The taxes for which assessment is provided under T. C. A. 67-901, et seq., are local taxes, and are not State taxes.

"2. Under the due process clauses of the Federal and State constitutions a county municipality, or taxing district cannot levy a tax upon personal property of a non-resident unless personal property of the non-resident has acquired a tax situs therein by being regularly and habitually within said county, municipality, or taxing district.

"3. The requirement contained in T. C. A. 67-906 that irregular route carriers shall report the number of vehicle miles operated in each county, municipality, or taxing district in the State imposes upon the Appellants an impossible task, and one where even attempted compliance is very expensive, causes great delays, and creates dangerous highway hazards. Such provision therefore creates an undue burden upon interstate commerce, and is void under the commerce clause of the United States Constitution. Since same is void, T. C. A. 67-913 must likewise be void, for the Appellants cannot be deemed to have waived the method of assessment and distribution thereof by failing to comply with a void requirement."

Conceding that the tax is local and not a state tax, yet that fact does not render the assessments void. The Commission is the proper authority for making assessments against complainants for local ad valorem taxation.

"The Tennessee Public Service Commission under T. C. A. 67-901, et seq., is the single agency required to assess for ad valorem taxation the property of all utilities and carriers operating in this state." Howard Sober, Inc., v. Clement, ... Tenn. App. ..., 372 S. W. (2d) 202.

Article 2, Section 28 of our Constitution provides in part as follows:

"All property shall be taxed according to its value, that value to be ascertained in such manner as the Legislature shall direct, so that taxes shall be equal and uniform throughout the State."

As to complainants' second proposition in which it is insisted that a county or a city may not levy a tax on personal property of a nonresident unless such property is regularly and habitually within its boundaries, we think has been settled by the reported decisions of this Court and our Supreme Court.

In the case of E & L Transport Company v. Ellington, ... Tenn. ..., 371 S. W. (2d) 456, it is said:

"Therefore, we conclude that:

"(1) appellants are irregular route motor carriers operating into or through Tennessee in interstate commerce;

"(2) such portion of their properties as is represented by the ratio of their Tennessee mileage to their total mileage has a Tennessee situs and is to be assessed for ad valorem tax purposes by the Tennessee Public Service Commission under T. C. A. Section 67-901 et seq.;

"(3) said statute is a valid and constitutional enactment, and has been so held without exception by the appellate courts of this State."

In the case of Howard Sober, Inc. v. Clement, supra, this Court said:

"This statute was drafted and passed for the express purpose of furnishing statutory authority for the assessment of ad valorem taxes upon the property of irregular route haulers which was in Tennessee under such circumstances as to warrant its taxation. In the preparation of the statute, free use

was made of other statutes enacted for similar purposes."

In the case of Jack Cole Company v. Ellington, ... Tenn. App. ...; 372 S. W. (2d) 204, wherein the same proposition was before the Court, it is said:

> "The record shows that a fair proportion of appellant's properties are used in Tennessee, although at irregular intervals, and that petitioner receives the benefit of Tennessee's laws, its roads and its other facilities thus enabling it to carry on its business in this State. And, although we cannot determine a fixed situs for these properties at any specific place, nevertheless, the statute provides that property so used in this State on the highways shall 'Be deemed to have a situs in Tennessee.' Thus, we think that the action of the Public Service Commission was tantamount to finding as a fact that such properties are so used in Tennessee as to come within this statute and therefore, have a situs in the State."

The foregoing finding of the Court finds support in the case of Central R. R. v. Pennsylvania, 370 U. S. 607, wherein it is said:

> "* * * A nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State. In American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899, 19 S. Ct. 599, this Court sustained the constitutionality of a Colorado property tax on a stipulated average number of railroad cars that had been located within the territorial limits of Colorado during the tax year, although it was agreed by the parties that the cars 'never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular

trains.' Id. 174 U. S. at 72. Habitual employment within the state of a substantial number of cars, albeit on irregular routes, may constitute sufficient contact to establish a tax situs permitting taxation of the average numbers of cars so engaged."

In Volume 17, No. 3 of the Vanderbilt Law Review, June 1964, at pages 1161, 1162 and 1163, there is a discussion of the three opinions of our Supreme Court and this Court in which the constitutionality of T. C. A. 67-901, et seq., the statute under consideration, was upheld, wherein it is said:

"Taxes imposed on interstate carriers for the privilege of engaging in interstate commerce are forbidden by the commerce clause. This has not generally been true with respect to local property taxes applied to vehicles of interstate commerce. Although vehicles are employed to transport interstate commerce, that fact alone does not afford either due process or commerce clause insulation from nondiscriminatory state and local property taxes. A property tax on the vehicles of interstate commerce, such as barges, tank cars, pipe lines, rolling stock, trucks, busses, and airplanes is a familiar type of sanctioned tax. As to vehicles moving in interstate land transportation, such as in the three cases at hand, it has long been settled that a non-domiciliary state can levy a property tax on the basis of the 'fair average' number of vehicles permanently within the taxing state during the tax year, although the individual vehicles traveling into, through, and out of the state differ. Vehicles of interstate transportation, if moving over fixed routes and regular schedules, may thus acquire a tax situs in several states, providing the states fairly apportion the taxes. The tax is open to attack on both due process and commerce clause grounds where it is not fairly apportioned to the use

of the vehicles within the taxing state as compared to their use without

* * * * * * *

"While it may be more difficult fairly to apportion a tax where the interstate carrier does not have a regular, scheduled route, as in the three cases at hand, nevertheless, such carriers should also pay their fair share of the cost of the state and local governments whose protection they receive and whose opportunities and benefits they enjoy. Moreover, exemption of these carriers from the tax would give them a competitive advantage over local carriers who must shoulder the tax burden."

Complainants admit they used a fair proportion of their properties in this State and received the benefit of our laws, roads, and other facilities during the year 1958. We quote from the petition:

"Petitioners admit and do not deny the fact that in the conduct of their business most of them have had vans and trucks in the State of Tennessee at various times and at various places, and certain of them have had property in the State habitually or continuously, but not in any county or city of the State."

We understand the complainants insist by their third assignment a strict compliance of T. C. A. 67-906 (2) on their part would result in an undue burden on interstate commerce. Conceding this to be true, yet it is obvious to us from this record that the Commission has not insisted upon a strict compliance with this section of the Act. But, to the contrary, has accepted and based its assessments upon the information furnished by those complainants reporting mileage in the State during the year 1958. There is no insistence on the part of any of the complainants that such a construction of this section of the Act places a burden on interstate commerce.

Revenue laws are construed against the State and in favor of the taxpayer and a substantial compliance is all that is required. We are of the opinion the Commission has applied this rule in this case.

Under such circumstances we think the Chancellor was correct in finding the complainants were in no position to urge the unconstitutionality of the statute on this ground.

In the case of West v. Carr, ... Tenn. ..., 370 S. W. (2d) 469, our Supreme Court said and quoted with approval the following:

> "In these circumstances, it is plain that complainant's bill fails to state a cause under our Declaratory Judgments Act. That Act deals only with present rights that have accrued under presently existing facts. It gives the Court no power to determine future rights or possible controversies in anticipation of events that may not occur. Ball v. Cooter et al., 185 Tenn. 631, 634, 207 S. W. 2d 340, 342; Coleman v. Henry, 184 Tenn. 550, 554, 201 S. W. 2d 686; Jared, et al. v. Fitzgerald, et al., 183 Tenn. 682, 688, 689, 195 S. W. 2d 1, 4. Newsum v. Interstate Realty Co., 152 Tenn. 302, 278 S. W. 56; Annotations, 12 A. L. R. 52, 69, 87 A. L. R. 1205, 1215-1219.
>
> "It does not enable courts to give advisory opinions upon what the law would be upon a theoretical or hypothetical state of facts. Hodges v. Hamblen County, 152 Tenn. 395, 399, 277 S. W. 901; Ball v. Cooter, et al., supra,; Jared, et al. v. Fitzgerald, et al., supra.
>
> " 'We will not pass on the constitutionality of a statute, or any part of one, unless it is absolutely necessary for the determination of the case and of the present rights of the parties to the litigation. Phillips

v. West, 187 Tenn. 57, 213 S. W. 2d 3, 5' (State ex rel. Loser v. National Optical Stores Co., 189 Tenn. 433, 444, 225 S. W. 2d 263, 268.) State ex rel. West v. Kivett, 203 Tenn. 49, 56, 308 S. W. 2d 833.

"The rule is the same, we understand, in the federal courts. 'Claims based merely upon "assumed potential invasions" of rights are not enough to warrant judicial intervention. Arizona v. California, 283 U. S. 423, 462, 51 S. Ct. 522, 75 L. Ed. 1154 (1169).' Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 324-325, 56 S. Ct. 466, 472-473, 80 L. Ed. 688, 699.

"Under the Federal Declaratory Judgment Act, as we understand, the rule is this: 'It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' (Citing cases.) Aetna Life Ins. of Hartford Co. v. Haworth, 300 U. S. 227, 241, 57 S. Ct. 461, 464, 81 L. Ed. 617, 621; Electric Bond & S. Co. v. Securities & Exch. Com., 303 U. S. 419, 443, 58 S. Ct. 411, 82 L. Ed. 936, 948.

" 'This Court, as is the case with all federal courts, "has no jurisdiction to pronounce any statute, either of a state or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered; one, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other, never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" ' (citing cases). United States v. Raines, 362 U. S. 17, 21, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529."

Finally, the insistence of complainants the waiver section of the Act, T. C. A. 67-913, is void must fail since this insistence depended upon our finding the statute unconstitutional under complainants' third proposition which we have considered and found without merit.

It results complainants' assignments of error are overruled and the decree of the Chancellor is affirmed with costs.

/s/ Chester C. Chattin,
Judge.

Bejach, J., concurs.

Shriver, J., not concurring.

Humphreys, J., not participating.

APPENDIX III.

Supreme Court, Nashville.

In the following case, the court is pleased to deny the petition for writ of certiorari:

Aero Mayflower Transit Co., et al.		
	vs.	Davidson Equity.
Cayce R. Pentecost, et al.		

(Chattin, J., not participating.)

4/7/65.

(Minute Book 46, Page 285)

APPENDIX IV.

Tennessee Code Annotated, Title 67, Chapter 9—Assessment of Utilities and Carriers:

"**67-901. Assessment by public service commission—Companies included—Situs of motor carriers.**—The Tennessee public service commission, hereinafter called the commission, is authorized and directed to assess for taxation, for state, county and municipal purposes, all of the properties of every description, tangible and intangible, within the state belonging to the following named persons, hereinafter referred to as companies, namely: (1) railroads; (2) telephones; (3) telegraphs; (4) sleeping cars; (5) freight cars; (6) street cars; (7) power, whether hydroelectric, steam, or other kinds, for the transmission of power; (8) express; (9) pipelines; (10) gas companies; (11) electric light companies; (12) motor bus and/or truck companies, which shall be deemed to include every motor carrier operating within, into and/or through the State of Tennessee under and by virtue of any certificate of convenience and necessity, permit or other operating authority granted by the Tennessee public service commission under the provisions of Title 65, Chapter 15, Tennessee Code Annotated; and (13) water companies. The Commission shall assess all of said property biennially in odd years at its actual cash value as of the same date the properties of other persons are by law assessed; provided, this chapter shall not apply to corporations organized under the laws of Tennessee whose principal business is the manufacture of products of the soil of Tennessee and who for the transportation alone of such products furnish their own cars.

"All motor carriers, including any such carrier not limited by its certificate, permit or other operating authority from the Tennessee public service commission to

any particular highway or highways, road or roads, and/or specific route or routes (which carrier shall be designated and is hereinafter referred to as an 'irregular route motor carrier'), operating within, into and/or through Tennessee and having been issued a permit or certificate of convenience and necessity by said commission shall, by virtue of their operations or right to conduct operations within, into and/or through Tennessee over the public highways of Tennessee, be deemed to have a situs in Tennessee, the same to be determined and ascertained by said commission, and any such carrier shall, as a condition precedent to the granting or exercise of such authority, appoint an agent within the state of Tennessee for the purpose of service of process. (Acts 1919, ch. 3, § 1; impl. am. Acts 1919, ch. 49, § 1; Acts 1919, ch. 160, §1; 1920 (E. S.), ch. 18, § 3; Shan. Supp., § 859a58; Mod. Code 1932, § 1508; Acts 1945, ch. 17, § 1; C. Sup. 1950, § 1508; Acts 1957, ch. 191, §§ 1, 2.)"

"**67-902. Filing of schedules by owners—Contents.**—It shall be the duty of the owners of property mentioned in § 67-901, within the state, to file with the commission on or before the first day of April, biennially, in the odd years, under oath, schedules and statements giving the following information concerning all properties owned or leased by such owners: (1) the name of the company, its nature, whether a person, association, copartnership, corporation, or syndicate, and under the laws of what state or country organized; (2) the location of its principal place of business, the post office address of the president, general manager, or executive officer or officers; (3) the name and postoffice address of the chief officer or managing agent of the company in Tennessee; (4) the gross receipts of its business as whole and also of its business done within the state, and operating expenses for the preceding fiscal year; (5) the total capital stock, number of shares issued or outstanding, the par face value

thereof, and in case no shares of stock are issued, in what manner its capital is divided, and its holdings evidenced; (6) the market value of said shares of stock or capital on the tenth (10th) day of January next preceding, or if said stock or capital have no market value, then the actual value; (7) the real estate, buildings, machinery, fixtures, appliances and personal property owned by said company which is actually located within this state, the actual value thereof and the counties or municipalities in which the same are located; (8) real estate, together with the permanent improvements thereon, situated outside of the state and not directly used in the conduct of the business within the state, the purpose for which it is used, its value and the sum at which it is assessed for taxation in the locality where situated; (9) the bonded indebtedness and the market value thereof, if it has such, otherwise its actual value.

"In addition to the foregoing information to be given by each owner of property assessable under this chapter, said statement shall contain information as set out in §§ 67-903—67-911. (Acts 1919, ch. 3, § 2; 1919, ch. 160, § 2; Shan. Supp., §§ 859a59, 859a60; mod. Code 1932, §§ 1509, 1510; Acts 1945, ch. 18, § 1; C. Supp. 1950, § 1509.)"

"67-906. Traction companies—Motor Carriers.— . . .

"B. From motor bus and/or truck companies, as defined in § 67-901:

. . .

"(2) From all irregular route motor carriers as defined in § 67-901; the total number of miles operated within, into and/or through the state of Tennessee by all the motor vehicles (which shall include vehicles operated by the carrier under any lease or leases; but which shall not include any vehicle operated exclusively within any one county or incorporated municipality) of any such carrier during the prior calendar year, together with the number

of vehicle miles operated during the prior calendar year within, into and/or through each county, incorporated municipality and/or taxing district authorized by law to collect ad valorem taxes within the state of Tennessee.

"(3) From all motor carriers; (a) the number of vehicles, their class and/or kind, the cost and value of each vehicle owned and/or operated by any such motor carrier; (b) the total number of vehicle miles operated by any such motor carrier, together with the total number of vehicle miles operated within, into and/or through the state of Tennessee during the prior calendar year; (c) the location and description of all buildings, land, materials and supplies, tools and equipment, furniture, motor vehicles operated exclusively within any one county or incorporated municipality, and other personal property, showing the cost and value of all such property, separately set forth to show same (1) within the state of Tennessee and (2) outside the state of Tennessee. (Acts 1919, ch. 3, § 2; Shan. Supp., § 859a63; mod. Code 1932, § 1514; Acts 1957, ch. 191, §§ 3, 5.)"

"**67-913. Waiver of objection to assessment by failure to file schedule—Penalty.**—The owner of any such property refusing or failing to file such schedules and statements shall be deemed to have waived the mode and manner of ascertaining the value of such property, and of the distribution or allocation by the Tennessee public service commission of such valuation or assessment to the various counties and municipalities of the state of Tennessee for the purposes of county and municipal taxation, and shall not be permitted to be heard in opposition to the valuation fixed upon said property by the commission, nor in opposition to the distribution or allocation of same by the commission to the various counties and municipalities for the purposes aforesaid; and shall in addition be liable to a penalty of one hundred dollars ($100) for each and every day which such owner is

delinquent in filing said statement or schedule. (Acts 1919, ch. 3, § 2; Shan. Supp., § 859a69; Code 1932, § 1521; Acts 1957, ch. 191, § 4.)"

"**67-914. Action for penalty for failing to file schedule.** —It shall be the duty of the attorney-general of the state, upon the request of the commission, to sue for and collect the same before any court of competent jurisdiction in the same manner as any other debt, penalty, or forfeiture is now collected by law. (Acts 1919, ch. 3, § 2; Shan. Supp., § 859a70; Code 1932, § 1522.)"

"**67-915. Additional information required by commission—Access to records.**—The commission shall require in addition to the schedules and statements above referred to, such additional information, and take such additional evidence as to the value of any property to be assessed by them as may be deemed proper, but such additional evidence shall be reduced to writing and opportunity afforded, if desired, to the owner to submit additional evidence or counter-evidence to that required by said commission, and the records of the said commission shall at all times be open to inspection of the owner or owners of any property assessable under the provisions of this chapter. (Acts 1919, ch. 3, § 3; Shan. Supp., § 859a71; Code 1932, § 1523.)"

"**67-918. Determination of value.**—Upon examination of every such schedule and statement and all other evidence taken by them, the said commission shall proceed to ascertain and determine the value of said property within the state for taxation and assess the same accordingly, taking into consideration the capital stock, corporate property, franchises, and gross receipts, the market value of the shares of stock and bonded indebtedness, and such other evidence as is afforded by said statements and schedules or other evidence taken to en-

able them to fairly and equitably fix the actual cash value of the properties of such persons. (Acts 1919, ch. 3, § 4; Shan. Sup., § 859a74; Code 1932, § 1526.)"

"**67-919. Apportionment of intangibles.**—The proportionate share of the value of the intangible property of such companies as do business in this and other states, growing out of the use of their tangible property in this state under their franchises, privileges, and contracts, shall have its situs in this state and in the several counties and municipalities thereof in which they exercise their rights; provided, that property of any such owner located outside of the state which is not directly used in the business to which the property in the state is devoted, shall not enter into the value of the property within the state to be assessed. (Acts 1919, ch. 3, § 5; Shan. Supp., § 859a75; Code 1932, § 1527.)"

"**67-920. Distributable property.—Apportionment by mileage.** . . .

"B. The franchises, choses in action, intangible property, and personal property within the state of Tennessee, but having no actual situs therein, of each motor carrier to be assessed under this chapter, and in addition thereto, the motor vehicles, buses, trucks, tractors, trailers and movable property of such motor carriers shall be known as distributable property and shall be assessed separately from the other property, if any within the state of Tennessee, of such motor carriers; after ascertaining the value of such distributable property wherever situated within the state, and after having deducted from its value one thousand dollars ($1,000), the commission shall:

* * * * * * *

"(2) with respect to all 'irregular route motor carriers' as defined in § 67-901, divide the remainder by the total number of miles operated within, into and/or through

the state of Tennessee by all of the motor vehicles (which shall include vehicles operated by the carrier under any lease or leases) of any such carrier during the prior calendar year and the result thereof shall be the value per vehicle mile of the distributable property of such motor carriers for the purposes of assessment and county and municipal ad valorem taxation, and the value per vehicle mile shall be multiplied by the number of vehicle miles operated during the prior calendar year within, into and/or through each and every county, incorporated municipality and/or taxing district in or through which any such carrier operated during such prior calendar year, and the product thereof shall be the amount to be assessed against such distributable property for any and all such counties, municipalities, and/or taxing districts.

"The commission is expressly authorized and empowered to distribute the assessments or values assessed against the distributable property of motor carriers, including 'irregular route carriers,' for the purposes of county and municipal ad valorem taxation, in the manner prescribed by this chapter, to the counties, municipalities and/or taxing districts within the State of Tennessee, in the manner and upon the basis hereinabove set forth in this section. (Acts 1919, ch. 3, § 6; Shan. Supp., § 859a76; Code 1932, § 1528; Acts 1957, ch. 191, § 6.)"

"67-926. Date of completion of assessments—Hearing of exceptions—Filing with board of equalization.—Said assessments shall be completed on or before the first Monday in August, and within ten (10) days from the first Monday in August, any owner, or user, the state or any county, municipality or incorporated town may appear and file exceptions to said assessment, together with such evidence as they may desire to submit as to the value of the property assessed, and at the expiration of said ten (10) days, said commission shall reassemble and examine such additional evidence and exceptions as may have been filed,

and act thereon, either changing or affirming their valuation. And on or before the first Monday in September, said commission shall file with the board of equalization the assessments made by them, together with such records as may be deemed necessary. (Acts 1919, ch. 3, § 9; Shan. Supp., § 859a81; Code 1932, § 1533; Acts 1945, ch. 19; § 1; C. Supp. 1950, § 1533.)"

"**67-928. Review of assessments by Board of Equalization.**—The state board of equalization shall proceed to examine said assessments so made by the commission, and they are authorized to increase or diminish the valuation placed upon any property valued by said commission, and are further authorized to require of said commission any additional evidence touching one (1) or more of the properties assessed, and shall consider such additional evidence so furnished in fixing the correct value of any property so assessed, and said assessments shall not be deemed complete until corrected and approved by the said board of equalization; and the governor is authorized to call said commission at any time to perform the duties imposed upon them; provided, however, that if said board of equalization shall so desire, they shall have the power without referring any assessment to said commission, themselves to employ experts, accountants, and to call witnesses to testify upon any assessment certified to them by said railroad and public utilities commission; and said board of equalization shall have the same powers to compel attendance of witnesses, production of books, papers, and documentary evidence as is by this chapter given to said commission. Said board of equalization shall have the right to call upon the interstate commerce commission for any valuations of property in the office of the interstate commerce commission and evidence in possession of said commission in support of such valuations.

"All of the evidence thus acquired by said board of equalization shall be considered by them in addition to

the evidence transmitted to said board by said commission in support of the assessment so fixed by said commission.

"Any expense incurred by said board in calling for the additional proof as to the value of any property certified to them by said commission shall be by said board of equalization certified to the director of accounts and paid by him out of any moneys in the treasury not otherwise appropriated. (Acts 1919, ch. 3, § 10; 1920 (E. S.), ch. 18, § 1; impl. am. Acts 1923, ch. 7, §§ 19, 25; Shan. Supp., § 859a82; mod. Code 1932, § 1534; impl. am. Acts 1937, ch. 33, §§ 24, 29.)"

"**67-929. Certification by board of equalization to commission—Payment and refund of excessive tax.**—On or before the third Monday in October, said board of equalization shall certify to the commission the valuation fixed by it upon each property assessed under this chapter, and the action of the board of equalization in fixing the valuation upon such property shall be conclusive and final and the valuation so fixed shall be assessed against said property and the taxes due thereunder be paid. Provided, that if any railroad or public utility has been or shall hereafter be aggrieved at the assessment so fixed and certified by the board of equalization, such railroad or public utility shall be required to pay the taxes due and owing the state, the counties and municipalities, upon the full value of said assessment, under protest, and upon termination of any proceedings that may be instituted in any of the courts of this state or in any of the courts of the United States of America by such railroad or public utility to review such assessment, the state, the counties and municipalities, and any school district, road district, or other taxing district to which such taxes have been paid, shall refund in cash and with interest, such part of the taxes so paid to them as may be adjudged to be excessive or illegal by any final decree or order entered

in any such proceeding, or in default of such refund, such railroad or public utility is authorized to take credit for the amount of such illegal or excessive tax with interest against any tax thereafter becoming due from and payable by such railroad or public utility, to the state, or any county, municipality, road district, school district, or any other taxing district authorized by law to levy taxes. (Acts 1919, ch. 3, § 11; 1921, ch. 39, § 1; Shan. Supp., § 859a83; Code 1932, § 1535; Acts 1939, ch. 7, § 1; C. Supp. 1950, § 1535.)"

"**67-931. Certification to local officials—Collection and disposition of tax.**—As soon as the commission shall have received said valuation from the board of equalization, the commission shall certify to the trustee and county tax assessor of each county in which any of such property lies, the amount to be taxed in said counties, respectively, for county purposes; and likewise to the city recorder and/or city official whose responsibility it is to collect the tax of any incorporated city or town the amount to be taxed by such city or town. The amount of the state tax shall be collected by the commission. The proceeds from the state tax shall be paid by the commission into the state treasury in the manner and for the purposes provided by § 49-601. (Acts 1919, ch. 3, § 12; 1921, ch. 39, § 1; Shan. Supp., § 859a84; Code 1932, § 1536; Acts 1947, ch. 17, § 1; C. Supp. 1950, § 1536; Acts 1957, ch. 256, § 1.)"

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SUPREME COURT, U. S.

SEP 17 1965

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 494.

BURNHAM VAN SERVICE et al.,
Appellants,

vs.

CAYCE R. PENTECOST et al.,
Appellees.

MOTION TO DISMISS APPEAL.

GEORGE F. McCANLESS,
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IN THE

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OCTOBER TERM, 1965.

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BURNHAM VAN SERVICE et al.,
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Appellees.

MOTION TO DISMISS APPEAL.

MAY IT PLEASE THE COURT:

OPINION BELOW.

This case was summarily disposed of in the Supreme Court of Tennessee, which denied certiorari without the rendering of an opinion. The Court of Appeals, which is the intermediate appellate court of Tennessee, did render a full opinion which has not as yet been officially reported. The opinion of the Court of Appeals, as well as that of the Chancery Court of Davidson County, are correctly reproduced as Appendices I and II of the Jurisdictional Statement.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTION PRESENTED.

Whether irregular route motor carriers, operating within, into and through Tennessee and engaged in the moving of household goods or similar enterprises, but having no fixed properties in Tennessee, are liable for ad valorem tax assessment by the Tennessee Public Service Commission under a Tennessee statute according to such properties a tax situs and ordaining the assessment of the properties of such carriers upon the basis of the ratio of miles traveled in Tennessee to total mileage, without offending the interstate commerce and due process clauses of the federal constitution.

STATUTE INVOLVED.

The pertinent provisions of the Tennesse utility and carrier assessment statute (Chapter 9 of Title, 67 T. C. A.) are accurately set forth in Appendix IV, p. 37 et seq., of the Jurisdictional Statement.

STATEMENT.

This litigation concerns the application of those provisions of the Tennessee utility and motor carrier assessment statute, providing for the assessment of the properties of irregular route motor carriers, to the properties of appellants. Appellants are with one exception movers of household goods, and all appellants are nonresident motor carriers engaged entirely in interstate commerce.

In Tennessee there is the customary general ad valorem property tax, but since 1949 none of such tax has been collected by the State government. Counties and mu-

nicipalities within the State are all authorized to levy the tax at whatever rate they elect, and the assessment of property for tax purposes is likewise conducted locally with the exception of the properties of carriers and public utilities. The latter are assessed under State statute by the Tennessee Public Service Commission (until a few years ago known as the Railroad and Public Utilities Commission). Assessments made by the Commission are certified by that body back to the various counties and municipalities, which then proceed to collect their respective taxes from the taxpayers upon the basis of such assessments.

In the case of irregular route motor carriers having no fixed properties within Tennessee, but operating upon the public highways of Tennessee, § 67-901, T. C. A., deems them to have a situs within Tennessee by virtue of such operations.

All carriers operating in Tennessee are required biennially to file schedules with the Commission setting forth certain basic information as to their identities, domiciles, receipts, property holdings, operations, etc. Section 67-906, T. C. A., imposes specifically upon irregular route motor carriers the duty of including in their schedule their total mileage operated during the preceding calendar year within the boundaries of Tennessee and of each county, municipality and taxing district authorized by law to collect ad valorem taxes within the State. They are also required to state their entire vehicle mileage incurred everywhere. Under § 67-913, T. C. A., anyone failing or refusing to file required schedules or statements is deemed to have waived the statutory manner or mode of assessing the value of his property and is thereby bound to accept the valuation placed thereon by the Commission, as well as the distribution or allocation of same made by the Commission.

Nine of appellants failed to file the required schedules and their properties were arbitrarily assessed by appellees. The other eighteen filed schedules but did not undertake in so doing to afford any breakdown of their Tennessee mileage as between the various municipalities, counties and taxing districts. The operating experience to be reported was that incurred during the year 1958, and it was to provide the basis for assessment of appellants' properties for the years 1959 and 1960.

As the Public Service Commission was about to make distribution of appellants' ad valorem assessments in the latter part of 1959, appellants instituted this proceeding by filing a petition for certiorari from the action of the Commission in the Chancery Court of Davidson County. A supersedeas staying the distribution of the assessments was granted and remains in force. The petition for certiorari thus filed attacked the Tennessee statutes in question upon the grounds urged in the Jurisdictional Statement.

The Chancery Court dismissed appellants' petition for certiorari upon the ground that the statutes in question were constitutional and had not been shown to have been unconstitutionally applied to appellants. An appeal was taken to the Court of Appeals of Tennessee, and the Middle Division thereof affirmed the action of the Davidson County Chancery Court. The Supreme Court of Tennessee denied certiorari, whereupon appellants instituted this appeal.

ARGUMENT.

The question presented by this appeal is in no sense a new one. It represents but a renewed effort by a single species of interstate carrier to avoid taxation of its properties by states and localities wherein its rolling stock operates, contrary to the oft-repeated pronouncements of this Court. While it is true that no case hitherto decided by this Court has dealt directly with the taxation on an apportioned basis of the rolling stock of an irregular route motor carrier by a non-domiciliary state, the truth is that there are even more compelling reasons for the sanctioning of such taxation than for upholding taxation of railroad, bargeline and air lines rolling stock. The latter are as a rule required to maintain some fixed properties in the state they traverse in the course of business, which properties are taxed like local property. They thus contribute to local government for the benefits afforded them and protections enjoyed.

On the other hand, appellants by nature are itinerants whose activities are such that terminal facilities, offices, etc. are unnecessary in the great majority of states whose public highways they utilize. Requiring no such localized property, they escape ad valorem taxation altogether unless the states can accord to them a theoretical situs for taxation of a fairly apportioned part of their rolling stock.

I.

The Decision Below Is Clearly Correct.

Appellees submit that the right of the State of Tennessee to provide for the ad valorem assessment and taxation of appellants' properties in question is clearly established in **Central R. R. v. Pennsylvania**, 370 U. S.

607, 8 L. Ed. (2d) 720, where it was said at p. 615 of 370 U. S.:

> "... a nondomiciliary tax situs may be acquired even if the rolling stock does not follow prescribed routes and schedules in its course through the nondomiciliary State."

Due process objections to ad valorem taxation of rolling stock by nondomiciliary states are without substance absent a showing that such property was not regularly or habitually in the taxing jurisdiction during the tax period. **Braniff Airways v. Nebraska,** 347 U. S. 590, 98 L. Ed. 973.

The record herein clearly demonstrates that all of appellants have had properties in Tennessee at various times and places, and some of them habitually or continuously. **By the very nature of an interstate household mover's business, it could not be otherwise.** Such an enterprise must necessarily make itself available to move anyone anywhere at any time. If it fails to do so, it is out of the market.

Thus, in a very real sense, the rolling stock of a household mover is ubiquitous. It is continually in all localities of all states, and potentially so at every moment.

This indisputable fact belies appellants' argument that their properties are never so continuously in any given city or county so as to make them amenable to assessment. To grant such a premise would be to deny to any save domiciliary states the right to exact ad valorem taxes of appellants.

Appellants apparently concede to the states of their domicile the right to tax their total rolling stock (pp. 15-16, Jurisdictional Statement). The record fails how-

ever to reveal any assertion of such jurisdiction against appellants. There is thus no showing of a risk of multiple burdens if Tennessee's tax stands.

Apart from this fact however, appellants simply have no legal right to concede away Tennessee's taxing jurisdiction asserted in a manner comporting with this Court's opinions. When appellants admit the substantial presence of their properties in Tennessee during a tax year, they foreclose their right to contend that all of such values belong to their home states.

II.

There Is No Important Question of Federal Law.

While as hereinbefore stated the Jurisdictional Statement adequately sets forth the formal jurisdictional requisites of this appeal, in reality there is no federal question of substance to be dec

The cases relied upon by appellants to make an important question of federal law out of the one here presented actually serve to buttress the decision reached in the courts below.

It was held for instance in **American Refrigerator Co. v. Hall**, 174 U. S. 70, 43 L. Ed. 899 (p. 82 of 174 U. S.):

> "It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, **where the specific and individual items of property**

> **so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business,** and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed" (Emphasis supplied).

In **Union Refrigerator Transit Co. v. Lynch**, 177 U. S. 149, 44 L. Ed. 708, the quoted language was relied upon to sustain an ad valorem property tax as against the contention that the property had no situs in the taxing state and the tax unlawfully burdened interstate commerce. In **Johnson Refining Co. v. Okla.**, 290 U. S. 158, 78 L. Ed. 238, the principle was restated to deny the right of a carrier's state of domicile to tax the carrier's entire property, a result which appellants here contend for. In **Northwest Airlines v. Minn.**, 322 U. S. 292, 88 L. Ed. 1283, taxation of a nonresident carrier, this Court upheld the domiciliary state's right to tax the entire fleet but in so doing made the pertinent observation (at p. 297 of 322 U. S.):

> "The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered."

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 93 L. Ed. 585, states the basis for taxation by nondomiciliary states. At p. 174 of 336 U. S. it is observed:

> "So far as due process is concerned the only question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. . . . Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State."

It can hardly be gainsaid that appellants look to the State of Tennessee alone for protection of their properties while they are within its borders, a situation which by their own admission may exist at any moment throughout the tax year and which appellants doubtless hope will exist as frequently as possible. Appellants make no question respecting the apportionment scheme employed by Tennessee, and they could hardly do so in view of the fact that it employs the ratio of appellants' Tennessee mileage to total mileage. If the Tennessee proportion of the total is large, the Tennessee assessment will be correspondingly large; if it is small, the assessment will be small; and in the unlikely event that any of them have during the tax year no Tennessee mileage, no part of their properties will be taxed.

Braniff Airways v. Nebr., 347 U. S. 590, 98 L. Ed. 967, clearly establishes the proposition that regular contact with the taxing state in the course of business will establish a taxing situs, even though that contact be small in the context of the carrier's over-all operations. **Bibb v. Navajo Freight Lines Co.**, 359 U. S. 520, 3 L. Ed. (2d) 1003, is wholly inapposite to the case at bar inasmuch as it involved a regulatory rather than a taxing statute. Even so, it recognizes that state statutes imposing regulations on interstate commerce will be struck down only when they discriminatorily affect the commerce. **Shafer v. Farmers Grain Co.**, 268 U. S. 189, 69 L. Ed. 909, likewise involved a regulatory statute, and the latter was stricken down apparently because it invaded a field preempted by a federal statute. No such situation exists in the case at bar. The cases of **Caldwell v. N. C.**, 187 U. S. 622, 47 L. Ed. 336, and **Robbins v. Shelby County Taxing Dist.**, 120 U. S. 489, 30 L. Ed. 694, struck down state taxes as violative of the commerce clause, but these taxes were very clearly privilege taxes. Privilege taxes upon interstate commerce, and the receipts therefrom have histor-

ically been disallowed by this Court, and for the very obvious reason that they subject interstate commerce to the danger of cumulative burdens, being susceptible of duplication by other states. This is not true in the case of a properly apportioned ad valorem tax.

It is thus more than apparent no constitutional question arises on the face of the statute of which appellants complain. Conceding for the sake of argument that this statute, like almost any other statute, though valid on its face might be unconstitutionally applied in a particular situation, this Court is not required to anticipate such an eventuality in the face of no showing whatever that it has been so applied. Courts, including this Court, have historically declined to make constitutional adjudications upon the basis of hypothetical fact situations, and to anticipate situations which may not arise.

To have standing to attack the constitutionality of a statute, a party must show that he had sustained or is immediately in danger of sustaining some direct injury as a result of the statutes enforcement. **Cramp v. Board of Public Instruction,** 368 U. S. 278, 7 L. Ed. (2d) 285. The power of this Court to pass upon the constitutionality of a statute will arise only when the interests of litigants require the use of that judicial authority for their protection against actual interferences, a hypothetical threat being insufficient. **United Public Workers v. Mitchell,** 330 U. S. 75, 91 L. Ed. 754. Mere potential impairment of constitutional rights under a statute does not of itself create a justiciable controversy in which the nature and extent of those rights may be litigated. **Communist Party of the U. S. v. Subversive Activities Control Board,** 367 U. S. 1, 6 L. Ed. (2d) 625.

Appellants have wholly failed to show that Tennessee has applied the statute in question in such manner as to

affect them adversely other than to exact of them their fair tax burden. The possible literal compliance with the statute from which they recoil with trepidation is not demonstrated to be a reality. At this point it is little more than a figment of appellants' imagination. Substantial compliance with the statute requiring the filing of schedules reflecting mileage traveled in Tennessee is all that has been demanded of appellants. There is no showing that Tennessee expects to demand any more. Appellants are therefore in no posture to complain that their interstate commerce is unconstitutionally burdened.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the appeal herein should be dismissed.

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GEORGE F. McCANLESS,
Attorney General,

.....

MILTON P. RICE,
Assistant Attorney General,

.....

GEORGE SHUFF,
General Counsel,
Tennessee Public Service Commission,
Counsel for Appellees.

Proof of Service.

I, Milton P. Rice, one of the attorneys for appellees, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 13th day of Sep-

tember, 1965, I served a copy of the foregoing Motion to Dismiss Appeal to the Supreme Court of the United States upon the Honorable J. G. Lackey, Jr., Stephenson, Lackey & Holman, First Federal Building, 236 Fourth Avenue, North, Nashville, Tennessee, one of the attorneys for appellants herein by mailing a copy thereof in a duly addressed envelope, U. S. postage prepaid.

.....

Milton P. Rice,
Assistant Attorney General.

END